P.E.R.C. NO. 95-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRIDGEWATER-RARITAN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-95-47

BRIDGEWATER-RARITAN EDUCATION
ASSOCIATION, INC.,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Bridgewater-Raritan Education Association, Inc. against the Bridgewater-Raritan Regional Board of Education. The grievance asserts that the Board violated the parties' collective negotiations agreement when it posted a custodial position with a different work week from that worked by other custodians. The Commission finds that the Board has a prerogative to determine the days and hours custodial services are needed and the number of custodians on duty at any given time. Given those determinations, however, the work schedules and work hours of individual employees are, in general, mandatorily negotiable. The Commission finds that the Board has a prerogative to determine that no weekend work need be assigned but not whether any weekend work performed will be paid at overtime rates.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Soriano & Soriano, attorneys
(Daniel C. Soriano, Jr., of counsel)

For the Respondent, Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, of counsel)

DECISION AND ORDER

On November 9, 1994, the Bridgewater-Raritan Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Bridgewater-Raritan Education Association, Inc. The grievance asserts that the Board violated the parties' collective negotiations agreement when it posted a custodial position with a different work week from that worked by other custodians.

The parties have filed exhibits and briefs. These facts appear.

The Association represents the Board's certificated personnel, secretarial/clerical personnel and service personnel, including custodians. The parties entered into a collective

negotiations agreement effective from July 1, 1992 through June 30, 1994. The contract states that the normal work week for custodians is eight hours per day, five days per week or forty hours per week. The grievance procedure ends in binding arbitration of contractual disputes.

The Board employs two district-wide substitute custodians. These custodians work forty hours per week, Monday through Friday. They fill in for absent custodians on any of the three custodial shifts; if no custodian is absent, they are assigned buildings and grounds duties. During the summer, district-wide custodians are assigned where needed.

At present, no custodians are assigned to work regularly on Saturdays. When Saturday work is needed, a custodian is called in and paid at overtime rates.

On March 7, 1994, the Board's Personnel Office posted a notice of a position entitled District-Wide Substitute Custodian I. The position offered a twelve month contract and required an employee to work Tuesday through Saturday each week. By offering this position, the Board sought to avoid paying current employees for overtime work on Saturdays and to have a custodian at the high school on Saturdays.

On March 11, 1994, the Association filed a class action grievance. The grievance asserted that the Board had violated the "terms and conditions of employment policy and law" by posting a custodial position with a Tuesday through Saturday work week. The grievance asked that the position be reposted according to the contract.

The Board denied the grievance as contractually unmeritorious. The Association then demanded arbitration. The demand identified the dispute as involving a unilateral change in work hours and work year and asked that the status quo be restored and that unit members be compensated for any financial losses. This petition ensued.

The Board has not hired a custodian yet. It is awaiting the outcome of this case.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the Board may have.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), sets forth the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere

> with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
> [Id. at 404-405]

It is undisputed that no statute or regulation preempts negotiations.

Under Local 195, the Board has a prerogative to determine the days and hours custodial services are needed and the number of custodians on duty at any given time. Given those determinations, however, the work schedules and work hours of individual employees are, in general, mandatorily negotiable. Local 195 at 412; Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1 (1973). Thus, an employer may agree that if weekend work is necessary, full-time employees working Mondays through Fridays will do that work and be paid at overtime rates. New Jersey Sports & Exhibition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988); New Jersey Sports & Exhibition Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987). This case does not involve an educational policy determination and instead centers on a good faith desire to reduce labor costs by defining the custodial work week to encompass weekend work hours. See Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); see also Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992);

Borough of Pompton Lakes, P.E.R.C. No. 90-68, 16 NJPER 134 (¶21052 1990); Ocean Cty. Bd. of Health, P.E.R.C. No. 82-6, 7 NJPER 441 (¶12196 1981).

The Board relies on two cases. Both are distinguishable.

In Gloucester Cty., P.E.R.C. No. 89-70, 15 NJPER 69 (¶20026 1988), recon. den., P.E.R.C. No. 89-86, 15 NJPER 154 (¶20063 1989), the employer proved a compelling governmental policy need to keep its nursing home laundry operating after four p.m. every day; health inspectors had complained that the laundry room was unsanitary and nurses had complained that laundry was being left undone and that patients were not receiving the laundry and linen they needed or the right clothes back. We therefore held that the employer did not commit an unfair practice when it created a third shift extending beyond four p.m.; we added, however, that the majority representative could seek to negotiate over the hours of work after four p.m. and could seek a compensation differential for that shift. Gloucester's holding in that unfair practice case does not apply in this scope of negotiations case where it is alleged that the employer has agreed that custodians will have a Monday through Friday work schedule and will be paid at overtime rates for any weekend work hours.

In Verona Bd. of Ed., P.E.R.C. No. 92-43, 17 NJPER 492 (¶22238 1991), the Commission dismissed an unfair practice charge alleging that the employer had violated its duty to negotiate when it unilaterally assigned a custodian to work regularly on Saturdays; the record demonstrated that the employer had been involuntarily

assigning custodians to weekend work for years and thus no change in an employment condition had occurred. Verona's holding in an unfair practice case does not apply in this scope of negotiations case where the Association contends that the Board has contractually obligated itself to a Monday through Friday work week. Whether or not the Board has so agreed is a question for the arbitrator, not for us. Ridgefield Park.

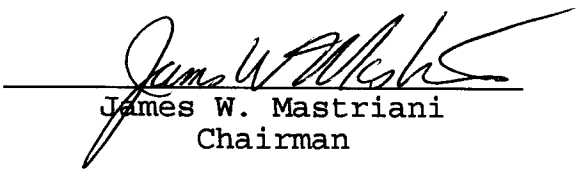
The Board also asserts that this case implicates its managerial prerogative to determine whether overtime work is necessary. See, e.g., Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983). That prerogative protects the employer's right to determine that no weekend work need be assigned, but it does not address the question of whether any weekend work performed will be paid at overtime rates. See New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143 at 495.

For these reasons we decline to restrain arbitration.

ORDER

The request of the Bridgewater-Raritan Regional Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioner Klagholz was not present.

DATED: May 23, 1995
Trenton, New Jersey
ISSUED: May 24, 1995